

FILED

MAY 19 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN FORSYTHE,

Defendant - Appellant.

No. 05-30200

D.C. No. CR-04-00157-EJL

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Submitted May 15, 2006^{**}

Before: B. FLETCHER, TROTT and CALLAHAN, Circuit Judges.

Brian Forsythe appeals from the 168-month sentence imposed following his guilty plea conviction to conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846, possession of firearms in furtherance of drug trafficking, in

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 18 U.S.C. § 924(c)(1), and conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291.

As a preliminary matter, we decline to enforce the appeal waiver contained in the plea agreement because, at the change of plea hearing, and at sentencing, the district court advised Forsythe that he could appeal his sentence. *See United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995).

Forsythe contends that the district court erred by enhancing his sentence for uncharged, relevant conduct pursuant to U.S.S.G. § 1B1.3, and for offense role, pursuant to U.S.S.G. § 3B1.1(c). We conclude that the enhancement for offense role was supported by the record, and we affirm. *See United States v. Smith*, 424 F.3d 992, 1015-16 (9th Cir. 2005).

Forsythe contends that the enhancement for uncharged conduct violated his immunity agreement with the government. While the district court concluded that there was an independent source to establish that Forsythe supplied methamphetamine to Eric Davis, it is unclear from the record whether the independent source provided information regarding the actual quantity of methamphetamine supplied. Accordingly, we vacate the sentence and remand to the district court to determine whether there was an independent source as to the

actual quantity of methamphetamine Forsythe supplied to Eric Davis. *See United States v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003).

AFFIRMED in part; VACATED and REMANDED.